In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1506

DR. PHILIP J. FICHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner filed this action in the United States Court of Claims seeking disability retirement pay based upon his Army service from 1942 to 1946. He alleges the following facts: On November 20, 1945, an Army Retiring Board found him permanently disabled because of flat feet, a condition which the Board found had existed prior to his military service but had been aggravated by that service (Pet. 3). The Board's findings were not approved by the Secretary of War, however, so petitioner appeared before a second Re-

tiring Board on October 17, 1946 (Pet. 3-4). The second Board found that petitioner's incapacity had existed prior to his service on active duty and had not been permanently aggravated by his service. The Secretary approved these findings, and on November 3, 1946, petitioner was released from active duty by reason of physical disability, but without retirement pay (Pet. 4; Ct. Cl. Pet. XXII [1]).

Petitioner also alleges that in 1945 he was advised that dismissals from the service, if not by court-martial, could be reviewed at any time up to fifteen years (Pet. 4). In 1959, the Army Adjutant General advised petitioner that he still had available administrative remedies and that "it appears that filing suit with the Court of Claims is not appropriate at this time" (Pet. 4).[2] Petitioner then applied to the Army Disability Review Board, which denied his claim on July 19, 1960, and to the Army Board for the Correction of Military Records, which denied relief on June 20, 1962 (Ct. Cl. Pet. XXVIII, XXIX).[3]

This action was filed on June 1, 1971 (Pet. 5). The Court of Claims held (Pet. App. 1a) that petitioner's claim was barred by 28 U.S.C. 2501, which provides

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[1] "Ct. Cl. Pet." references are to the petition filed by petitioner in the Court of Claims.

[2] A copy of the Adjutant General's 1959 letter is attached as an exhibit to the Court of Claims petition. That letter also states: "Although administrative remedy may be available, this does not preclude filing suit with the Court of Claims."

[3] On March 1, 1962, the Veterans' Administration awarded petitioner compensation for flat feet (Ct. Cl. Pet. XXX).

in part: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

2. The decision below—which merely involves the application by the Court of Claims of well-settled rules for determining when claims accrue for purposes of applying the statute of limitation—is correct, and further review is unwarranted.

In seeking to escape the impact of 28 U.S.C. 2501, petitioner argues that the government's failure to pay each periodic installment of disability pay gives rise to a separate cause of action (Pet. 6). Claims for disability retirement pay, however, generally accrue upon the first final administrative disapproval of the serviceman's claim and are barred if suit is not instituted within six years. See *Friedman* v. *United States*, 310 F. 2d 381, 395-396, certiorari denied, 373 U.S. 932; *Lipp* v. *United States*, 301 F. 2d 674, certiorari denied, 373 U.S. 932. An exception to this general rule has been established for cases where all the prerequisites for entitlement to disability retirement pay have been met—*i.e.*, where the Retiring Board's finding of service-caused incapacity has been approved by the Secretary—but no payments have been made. *Wason* v. *United States*, 179 Ct. Cl. 623; *Lerner* v. *United States*, 168 Ct. Cl. 247; *Barnes* v. *United States*, 163 Ct. Cl. 321. In such cases, a continuing claim exists permitting suit at any time with respect to installments for the preceding six years. Petitioner's claim, however, is not within this excep-

tion since the Secretary never approved a finding of his service-caused incapacity. Therefore, his action has been barred since 1952, six years after the Secretary disapproved his claim.

3. Petitioner also contends that the government is estopped from asserting the statute of limitations since its misrepresentations induced him to delay filing suit (Pet. 9). In support of this allegation, petitioner points to the advice he received in 1945 that dismissals could be reviewed at any time up to fifteen years, and to the 1959 letter stating that suit was "not appropriate at this time" because administrative remedies had not been exhausted. The 1945 document appears to have referred only to administrative review under 10 U.S.C. 1554, which petitioner did in fact obtain. If this view is correct, the 1959 letter was of no effect since the statute of limitations had run long before it was written. In any event, petitioner's failure to file suit for almost nine years after the Correction Board's 1962 decision—the final administrative decision on his claim—cannot be attributed to either document.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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